

(50)
No. 90-1014

**IN THE SUPREME COURT OF THE
UNITED STATES**
October Term, 1990

ROBERT E. LEE, ET AL.,

Petitioners

v.

DANIEL WEISMAN, ETC.

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the
First Circuit

Amicus Curiae Brief in Support of
Petitioners' Request for Certiorari

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26 PP

TABLE OF CONTENTS

Interest of the Amicus Curiae.	1
Summary of the Argument.	3
Argument: Reasons for Granting the Writ	5
I. The Decision Below Conflicts with Decisions of Other Circuits.	5
A. Which Test Should be Followed?	5
1. The <i>Marsh</i> Conflict	5
2. The <i>Lemon</i> Conflict	8
B. Regulating the Content of Prayers	10
II. The Controversy Among the Courts is Contrary to Public Policy, Interferes with Proper School Governance, and Imposes Unreasonable Costs Upon Local School Systems.	14
III. The Instant Case is Well Suited to Resolution of the Primary Issues in This Line of Cases. . .	18
Conclusion	18

TABLE OF AUTHORITIES

CASES

<i>A.E.M. v. Board of Education of Jordan School District, No. C-89-538S (D.Ut. 1989).</i>15
<i>Bennett v. Livermore Unified School Dist., 238 Cal.Rptr. 819 (Cal.App. 1 Dist. 1987)</i>10
<i>Board of Education of the Westside Community Schools v. Mergens, 495 U.S. _____, 110 L Ed 2d 191 (1990).</i>13
<i>Brandon v. Board of Ed., 635 F.2d 971 (2d Cir. 1980) cert. denied, 454 U.S. 1123 (1981) reh'g denied, 455 U.S. 983 (1982)</i>9
<i>Brown v. Board of Education, 347 U.S. 483 (1954)</i>17
<i>Brown v. Rockland School District No. 22, No. 89-4116 (D.Id. 1989).</i>15
<i>Campbell, et al. v. Utah State Board of Education, No. 90-0503333 (Ut. 5th Dist. 1990).</i>16
<i>Commers v. Big Horn School District No. 1, No. C-90-189J (D.Wy. 1990).</i>15
<i>Edwards v. Aguillard, 482 U.S. 578 (1987)</i>6

Engel v. Vitale,
370 U.S. 421 (1962)11

Grand Rapids School District v. Ball,
473 U.S. 373 (1985) 6

*Jaffree v. Board of School
Commissioners of Mobile County*,
459 U.S. 1314 (1983). 8

Lanner v. Wimmer, 662 F.2d 1349
(10th Cir. 1981). 9, 12

Lemon v. Kurtzman,
403 U.S. 602 (1971)passim

*Lundberg v. West Monona Community
School District*, 731 F.Supp. 331
(N.D.Iowa 1989)16

Marsh v. Chambers,
463 U.S. 783 (1983)passim

*Randall J. Vaughn, et al. v.
Washington County School
District*, No. 90-C-430W
(D.Ut. 1990).15, 16

*Sands v. Morongo Unified School
District*, 262 Cal.Rptr. 452
(Cal.App. 4 Dist. 1989),
review granted, 782 P.2d 1139
(Cal. 1989)10

*Stein v. Plainwell Community
Schools*, 822 F.2d 1406
(6th Cir. 1987)passim

Wallace v. Jaffree,
472 U.S. 38 (1985). 8

Weisman v. Lee,
728 F.Supp. 68
(D.R.I. 1990)passim

Weisman v. Lee,
908 F.2d 1090
(1st Cir. 1990)passim

Widmar v. Vincent,
454 U.S. 263 (1981)12

*Wood v. Mt. Lebanon Township School
District*, 342 F.Supp. 1293
(W.D.Pa. 1972).17

MISCELLANEOUS

Commencement speech by Dr. Hugh Nibley,
Professor of Ancient Studies,
Brigham Young University,
August 19, 1983 7

Grames, (Claims Manager, Utah State
Division of Risk Management),
Letter to John W. Palmer,
August 27, 199016

Lee v. Weisman, Petition for a Writ of
Certiorari, No. 90-1014
(U.S. 1990). 14, 18

Rea, *Big Horn Drops Prayer at
Schools; District Settles*
with ACLU, Casper Star-Tribune,
Nov. 21, 1990, p. A1.15

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INTEREST OF THE AMICUS CURIAE

The *National Association of State Boards of Education* (NASBE) is a nonprofit, private association that represents state and territorial boards of education in national affairs and assists those boards in the fulfillment of their duties. NASBE's principal objectives are to strengthen state leadership in education policymaking, promote excellence in the education of all students, advocate equality of access

to educational opportunity, and assure responsible lay governance of public education.

NASBE's interest in this case arises from the extent to which confusion about the constitutionality of graduation prayer is disrupting public education. The problem is national in scope, and has resulted in bitter dissension, loss of public confidence, and great expense for the public schools. Given current conditions, the schools and society can ill afford any of those outcomes.

NASBE has not taken a position on the merits of this case; it simply seeks to have it decided. Some might ask whether the question is important enough for this Court to address at this time: the Nation will doubtless survive regardless of whether graduation prayer is held to be permissible or impermissible. NASBE questions, however, whether effective education can occur or public confidence can be maintained in many of our public school systems if the question is not decided one way or the other. School districts, school boards, and school administrators are being harassed, enmeshed in controversy, and sued regardless of the position which they adopt relative to graduation prayer. Both proponents and opponents claim the protection of the Constitution, both have been upheld by decisions of State and Federal courts, and both claim support for their respective positions in past decisions of this Court. Partisans therefore continue to wage their wars

across a defenseless public school system, inflicting serious, immediate, and irreparable harm upon those systems and, more importantly, upon the children whom they serve.

While NASBE and its member state boards of education do not express a view as to the answer which the Court should give in deciding the question itself, NASBE and its membership have a vital and compelling interest in the answer, and urge the Court to accept and decide the case. Petitioner and respondents have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The injunction issued by the United States District Court for the District of Rhode Island and upheld by the First Circuit Court of Appeals presents the issue of graduation prayer squarely as a question of the meaning of the First Amendment to the United States Constitution. There are no pendant State issues. The injunction issued by the District Court and upheld by the First Circuit simply declares graduation prayers to be unconstitutional, in violation of the First Amendment, and permanently enjoins the public schools from "authorizing or encouraging" prayer at graduation.

The opinion of the First Circuit in 1990 is in conflict with an opinion in a similar case in the Sixth Circuit which was issued in 1987. In 1980 the Second

Circuit, in dicta, endorsed a position somewhat more permissive than that taken by the Sixth Circuit, while in 1981 the Tenth Circuit, also in dicta, appeared to support the position of the First Circuit. In addition, the Sixth Circuit's requirement that permissible prayers be "civil" prayers would apparently require school officials to prescribe, or to examine and monitor, the content of those prayers, a practice rejected by the First Circuit which would also appear to violate positions taken by this Court and by the Tenth Circuit. Similar conflicts appear in decisions issued by other state and federal trial and appellate courts.

Predictably, the lack of a clear statement by the Supreme Court concerning graduation prayer, and the confusing patchwork of federal and state court decisions, has created an environment ripe for intimidation and threats of legal action against financially troubled school districts. Failure to address the issue at this time will result in continuation of litigation in several states, initiation of litigation in others, and a surrender by harried school officials to special interest groups that often appear to be less concerned with the rights and interests of children than with furtherance of their own personal objectives.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

A. WHICH TEST SHOULD BE FOLLOWED?

This Court has used two tests in recent years when applying the First Amendment to church-state issues: the historical analysis of *Marsh v. Chambers*, 463 U.S. 783 (1983), and the three-part analysis of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). The Circuit Courts have issued conflicting decisions regarding both the applicability of *Marsh*, and the interpretation of *Lemon*.

1. The *Marsh* Conflict

The First Circuit's decision in the instant case regarding the constitutionality of graduation prayer under the First Amendment is in direct conflict with the Sixth Circuit's opinion in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987). In *Stein*, the Sixth Circuit held that invocations and benedictions in public school graduation ceremonies were not necessarily precluded by the First Amendment. That holding was based upon this Court's decision in *Marsh*, 463 U.S. at 795, which rejected a challenge to daily invocations in the Nebraska legislature. The *Marsh* holding did not follow the three-part *Lemon* test, 403 U.S. at 612-613, choosing instead to

adopt an historical analysis of the practice of legislative prayer, a practice which this Court found to be "deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786.

The Sixth Circuit's utilization of *Marsh* came despite statements made by this Court in *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985), stressing the importance of the *Lemon* test in school cases. In a case decided after the Sixth Circuit's opinion in *Stein*, see *Edwards v. Aguillard*, 482 U.S. 578, 583 n. 4 (1987), this Court again noted the importance of the *Lemon* test and also appeared to reject the use, in public school cases, of the historical approach adopted by the Sixth Circuit: "a (sic) historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." *Id.*

The First Circuit refused to follow the Sixth Circuit's reliance on *Marsh*, see *Weisman v. Lee*, 728 F.Supp. 68, 74 (D.R.I. 1990), and 908 F.2d 1090 (1st Cir. 1990), choosing instead to follow *Lemon*. Upon finding that graduation prayer would, in its opinion, violate the second prong of the *Lemon* test, the First Circuit upheld the District Court's ban on graduation prayer. *Weisman*, 908 F.2d at 1090.

Circuit Judge Campbell argued in his dissent in the First Circuit opinion that *Marsh* may still have validity in determining the Constitutionality of graduation prayer despite this Court's apparent unwillingness to use an historical analysis in public school cases, *Weisman*, 908 F.2d at 1098 (Campbell, C.J., dissenting). Judge Campbell argued that graduation ceremonies could be considered to be public meetings, so that graduation prayer would be more closely analogous to legislative prayer than school prayer.

Graduation services do have an historical context, pre-dating the establishment of public schools and stretching back several hundreds of years to what was unquestionably a religious beginning (even the "mortar board" caps and long gowns traditionally worn by graduates are simply adaptations of similar clerical robes worn during previous centuries¹). If graduation

¹ An interesting discussion of the origin of the graduation robes may be found in a commencement speech given by Dr. Hugh Nibley, Professor of Ancient Studies, Brigham Young University, on August 19, 1983. His comments included the following: "[t]hese robes originally denoted those who had taken clerical orders, and a college was a 'mystery' with all the rites, secrets, oaths, degrees, tests, feasts, and solemnities that go with initiation into higher

services are something apart from the normal course of events in the public schools, as Circuit Judge Campbell suggests, then previous statements by this Court regarding prayer in schools ["There can be little doubt that the District Court was correct in finding that conducting prayers as part of a school program is unconstitutional under this Court's decisions." Justice POWELL in his capacity as Circuit Justice for the Eleventh Circuit, in *Jaffree v. Board of School Commissioners of Mobile County*, 459 U.S. 1314, 1315 (1983), quoted in *Wallace v. Jaffree*, 472 U.S. 38, 45, n. 25 (1985)], may not be applicable, and prayer could perhaps be continued at the option of local school authorities as a reasonable accommodation of an historical practice. As is apparent in the Sixth Circuit's opinion in *Stein*, and in Circuit Judge Campbell's dissent in the instant case, the question of the relationship of graduation services to the public schools, and the question of the applicability of the *Marsh* historical analysis, are still open, are still troubling, and are still incapable of resolution by local school officials until this Court speaks.

2. The *Lemon* Conflict

knowledge." He then proceeded to trace the origin of the robes, and to some extent the ceremonies, back through the early Christian Church to the Roman Empire and beyond.

The graduation prayer dilemma would not be resolved for local school officials even if this Court were to clearly eliminate recourse to the *Marsh* analysis in such cases. The First Circuit's holding in the instant case sustained the invalidation of graduation prayer on the basis of the *Lemon* test, claiming that "[t]he special occasion of graduation coupled with the presence of prayer creates an identification of governmental power with religious practice." *Weisman*, 728 F.Supp. at 73; 908 F.2d at 1090. A statement by the Second Circuit in dicta, given in a case applying the *Lemon* test to another issue, found no such conflict: "where a clergyman briefly appears at a yearly high school graduation ceremony, no image of official state approval is created." *Brandon v. Board of Ed.*, 635 F.2d 971, 979 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981), reh'g denied, 455 U.S. 983 (1982). And the Tenth Circuit, speaking in dicta in a case which involved the application of the *Lemon* test to released time religious instruction, stated, "It is clear, however, that public schools are prohibited from engaging in activities which are essentially religious, religiously ceremonial, or worship-like, such as the recitation of prayer or scripture," *Lanner v. Wimmer*, 662 F.2d 1349, 1354 (10th Cir. 1981).

The First and Second Circuits are not alone in their dispute concerning the correct application of *Lemon* to

graduation prayer; similar conflicts exist among other federal and state trial courts, *cf Bennett v. Livermore Unified School Dist.*, 238 Cal.Rptr. 819, 824, (Cal.App. 1 Dist. 1987): "We therefore conclude that the State action at issue violates all three parts of the *Lemon* test, and hold that the inclusion of a religious invocation at a high school graduation violates the First Amendment" (emphasis in original), and *Sands v. Morongo Unified School Dist.*, 262 Cal.Rptr. 452 (Cal.App. 4 Dist. 1989), review granted, 782 P.2d 1139 (Cal. 1989) (holding that the *Lemon* test is not violated by a nonsectarian graduation prayer). School officials and their legal advisors are thus adrift in a sea of speculation, guided by a spinning compass.

B. REGULATING THE CONTENT OF PRAYERS

While holding that graduation prayer is not *per se* unconstitutional, the Sixth Circuit invalidated the particular prayers given, since they "employ[ed] the language of Christian theology and prayer. Some expressly invoke[d] the name of Jesus as the Savior." *Stein*, 822 F.2d at 1410. Limiting acceptance of graduation prayer to "nonsectarian" prayer has also been endorsed by a California Court of Appeal, *Sands*, 262 Cal.Rptr. at 461.

In the instant case, the Providence School Committee took pains to distribute a pamphlet entitled "Guidelines for Civic

Occasions," which included suggestions for composing a non-sectarian prayer. The school principal also advised the person who gave the invocation and benediction at the middle school that the prayers should be nonsectarian, *Weisman*, 728 F.Supp. at 69. Despite the fact that the District Court found the prayers to be "examples of elegant simplicity, thoughtful content, and sincere citizenship," *id.*, n. 2, the prayers were found to violate the second prong of the *Lemon* test because they included an appellation to a deity. *Id.* at 72. The District Court based its rejection of even nondenominational prayer upon this Court's decision in *Engel v. Vitale*, 370 U.S. 421, 430 (1962), "[T]he fact that the prayer may be denominationally neutral ... [cannot] serve to free it from the limitations of the Establishment Clause."

A requirement that prayers be non-sectarian or non-denominational would appear to require at a minimum that school officials adopt a policy regulating the content of prayers. Under *Stein*, 822 F.2d at 1410 that would appear to include elimination of any references to a given religion's theology or the use of a given religion's prayer format, and would require instead the establishment of the format and language of a court-approved form of religion, the "American Civil Religion." *Id.* at 1409, *Marsh*, 463 U.S. at 793, n. 14. If an invocation or benediction were to be permitted under the District Court's opinion in the

instant case, it would even appear to be necessary to eliminate any reference to a deity, along with use of the word, "amen." *Weisman*, 728 F.Supp. at 69 and 72.

Requirements that school districts become religious censors, exercising prior restraint to ensure that prayers are in conformity with the established form of the "American civil religion," are in sharp conflict with a decision of the Tenth Circuit and appear to be in violation of the opinion of this Court as expressed in *Marsh*, despite the Sixth Circuit's citation to that case, see *Stein*, 822 F.2d at 1409, in its "civil" invocation requirement. The Tenth Circuit, in invalidating a rule of the Utah State Board of Education that prohibited the granting of high school graduation credit for church-sponsored courses taught in a released-time program if those courses were "mainly denominational" in content, *Lanner*, 662 F.2d at 1360, held that "a purely religious test for determining what is not 'mainly denominational,' and therefore credit worthy, is not to be left to the state." *Id.* at 1361. A similar sentiment is expressed in *Marsh*, where this Court noted that "it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer," *Marsh*, 463 U.S. at 795, and in *Widmar v. Vincent*, 454 U.S. 263, 272, n. 11 (1981): "[T]he University would risk greater 'entanglement' by attempting to enforce its exclusion of

'religious worship' and 'religious speech.'"

Many NASBE members have attempted to address the issue of religious pluralism and the First Amendment by encouraging local officials responsible for planning graduation ceremonies to rotate opportunities for giving invocations and benedictions among the various groups of believers and non-believers in their respective communities, on the basis that "secondary students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Board of Education of the Westside Community Schools v. Mergens*, 495 U.S. ___, ___, 110 L Ed 2d, 191, 216 (1990). It is clear, however, as shown by the efforts of the Providence, Rhode Island School Committee, *Weisman*, 728 F.Supp. at 69, that others among this country's lay boards of education, in their efforts to conform with what they see as the rule of the Constitution as interpreted by *Stein*, *Sands*, and similar cases, are embarking on "sensitive evaluation[s]" and commencing to "parse the content" of prayers offered as part of graduation ceremonies in an effort to avoid the symbolic placement of the government's official seal of approval on one religious view, *Stein*, 822 F.2d at 1409, *Marsh*, 463 U.S. at 792. Should there not, however, be equal concern about the symbolic effect of government entangling itself by acting to amend or delete words

and phrases in something as personal and inherently religious as prayer? NASBE is concerned about the implications of assigning any such activity to lay boards of education or school officials.

II. THE CONTROVERSY AMONG THE COURTS IS CONTRARY TO PUBLIC POLICY, INTERFERES WITH PROPER SCHOOL GOVERNANCE, AND IMPOSES UNREASONABLE COSTS UPON LOCAL SCHOOL SYSTEMS

As noted in the Petitioners' *Petition for a Writ of Certiorari*, p.14 n. 15, there have been at least seven published cases regarding graduation prayer since 1980, four of which have reached the appellate level. That number does not accurately reflect the true number of cases actually decided, however, since it ignores cases decided in state trial courts and not appealed. In addition, the number does not reflect cases filed but settled out of court, those currently in litigation, or those which are threatened but not filed because the affected school district has conceded on the issues to avoid litigation.

NASBE and its member state boards of education do not, as a general rule, maintain records of litigation in school districts. According to reports received by NASBE during the preparation of this brief, however, it appears that suits are presently pending in at least six states: California, Hawaii, Idaho, Pennsylvania, Utah, and Wyoming. Several other suits,

including two in Wyoming, two in Idaho, one in Utah, and one in Oregon, were reported to have been dropped within the last two years in response to the defendant school districts' agreement to ban graduation prayer. One suit, *Randall J. Vaughn et al. v. Washington County School District*, No. 90-C-430W (D.Ut. 1990), seeking permission to hold prayer as part of a graduation service was dropped in Utah in response to the defendant school district's agreement to review the matter in a public hearing each year prior to graduation.

Despite the fact that a definitive answer has not been given by this Court concerning the issue of graduation prayer, school boards facing tight budgets, crowded classrooms, and inadequate textbooks are increasingly unwilling to commit district funds to a defense of graduation prayer, deciding instead to simply yield to the threats of prayer opponents by banning prayer. The school board in Big Horn County, Wyoming, for example, decided in November, 1990 to drop graduation prayer rather than pursue a defense of a suit, *Commers v. Big Horn School District No. 1*, No. C-90-189J (D.Wy. 1990), stating that taxpayers' money would be "better spent on educating children than litigation on religious issues." *Casper (Wyoming) Star-Tribune*, Nov. 21, 1990, p. A1. A similar course was followed in *Brown v. Rockland School District No. 22*, No. 89-4116 (D.Id. 1989), settled by Consent Decree on May 23, 1990, and *A.E.M. v. Board of*

Education of Jordan School District, No. C-89-538S (D.Ut., 1989). The decision in such cases is not, therefore, one reached through a discussion on the merits by the elected local policymakers in the affected school districts; it is rather a decision imposed by partisans using the financial burdens of the litigation process to coerce a decision.

Simply stopping the practice of graduation prayer, absent a definitive decision by this Court, will not stop the controversy or financial loss, however. School districts in Iowa, *Lundberg v. West Monona Community School District*, 731 F.Supp. 331 (N.D.Iowa 1989), and Utah, *Randall J. Vaughn, et al. v. Washington County School District*, No. 90-C-430W (D.Ut., 1990) were sued for barring the practice of graduation prayer. A similar case is currently being pursued against the Utah State Board of Education, *Campbell, et al. v. Utah State Board of Education*, No. 90-0503333 (Ut. 5th Dist. 1990). In some cases, board members have been advised that failure to stop the practice of graduation prayer may result in legal action against individual board members and personal financial liability, *Lundberg*, 731 F.Supp. at 335. In both the Iowa (*id.*) and Utah² school district

² Letter dated August 27, 1990 from Warren Grames, Claims Manager, Utah State Division of Risk Management, to John W. Palmer, Attorney for the Washington

cases, local boards were also advised that insurance carriers would not defend suits involving graduation prayer, and that costs incident to any such defense would be the sole responsibility of the affected school districts. In the *Vaughn* case, in which the defendant school district was sued for stopping graduation prayer, District Superintendent Steven H. Peterson reported to the Utah State Office of Education that the insurance carrier's decision resulted in legal costs to the school district in excess of \$12,000.

It has now been some eighteen years since the first published graduation prayer case, *Wood v. Mt. Lebanon Township School District*, 342 F.Supp. 1293 (W.D. Pa. 1972), was reported. Despite that passage of time and a number of cases on point, courts have given little reliable guidance for local school officials to follow in addressing such issues. The result has been governance by intimidation, a strange outcome for an issue centered in the First Amendment. If it be true, as this Court has previously stated, that "[t]oday, education is perhaps the most important function of state and local governments,"

County School District: "Our policy with the Washington County School District does not provide coverage for this particular type of action. For that reason, any settlement or legal billing directed to us will be rejected."

Brown v. Board of Education, 347 U.S. 483, 493 (1954), then it would appear to be contrary to public policy to allow the current situation to continue.

III. THE INSTANT CASE IS WELL SUITED TO RESOLUTION OF THE PRIMARY ISSUES IN THIS LINE OF CASES

As noted above, financial and other considerations have resulted in litigants bringing relatively few graduation prayer cases through to decision, and fewer still to appeal. Most of the cases have been filed on both state and federal grounds, including all other cases currently pending, according to information reported to NASBE officials. Despite the claimed state grounds, the published decisions, without exception, devote primary analysis to First Amendment issues and there does not appear to be any significant effort to construct a strong body of independent state law. Nevertheless, inclusion of state grounds in a suit makes it difficult to pursue a definitive resolution of the federal issues. The instant case has avoided those difficulties. It is presented solely as a question of First Amendment interpretation, *Lee v. Weisman*, "Petition for a Writ of Certiorari", p. i, enabling this Court to address that issue squarely and definitively.

CONCLUSION

For the foregoing reasons, the

National Association of State Boards of Education respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit be granted in case no. 90-1014, *Robert E. Lee, et al., v. Daniel Weisman, Etc.*, and the case be set for plenary review.

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